No. 17585

In the

United States Court of Appeals

For the Ninth Circuit

RAY B. WOODBURY,
Appellant,
v.
UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S BRIEF

Appeal from the Judgment of Dismissal of the
United States District Court for
the District of Oregon

THE HONORABLE JOHN F. KILKENNY, *Judge*

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THE HONORABLE JOHN F. KILKENNY, *Judge*

STATEMENT OF JURISDICTION

This action was filed on September 30, 1957 (R. 17), in the United States District Court for the District of Oregon (R. 3). The original jurisdiction of the District Court was invoked under the provisions of the Federal Tort Claims Act, 28 USCA Section 1346 (b) and 28 USCA Sections 2671-2680 (R. 4). The question of whether the District Court had jurisdiction of the cause is before this court on this appeal.

On February 14, 1958, appellee filed its motion to dismiss and in the alternative for summary judgment (R. 17-19). By stipulation of the parties contained in the pre-trial order (R. 45), the issues raised by the motion to dismiss were segregated for hearing in advance of other issues in the case (R. 116). The segregated issues came on for trial before the court without a jury on December 12, 1960 (R. 122-123). February 8, 1961, the court entered its opinion in favor of appellee (R. 79-117). February 24, 1961, the court entered its judgment of dismissal, dismissing appellant's complaint and the causes of action therein contained (R. 117-118).

Appellant filed his notice of appeal on April 11, 1961 (R. 118), within the time allowed by Rule 73 (a), Federal Rules of Civil Procedure. April 21, 1961, the court entered its certificate and order nunc pro tunc to appear of record as of February 24, 1961, that in entering its judgment of dismissal it intended to make the same final pursuant to the requirements of Rule 54 (b), Federal Rules of Civil Procedure. It found that there was no just reason for delay in the entry of final judgment on appellant's complaint and directed that final judgment be entered on such complaint (R. 121-122).

Consequently, this court has jurisdiction to review the judgment of dismissal of the District Court under 28 USCA Section 1291 and Rule 54 (b), Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

A. Preliminary Statement.

This case relates to the purview of the Federal Tort Claims Act and, as such, it has a significance which extends far beyond its impact upon appellant. The legal principles involved in this case and the question before this court are basic to the application of the Act, and it is, therefore, inevitable that the outcome will have considerable nation-wide importance.

There is no question as to the facts in this case. The issues before this court are of law. Appellant agrees with and accepts the District Court's findings (infra, page 22). He challenges only the court's conclusion, that is, that it does not have jurisdiction of this cause under the provisions of the Federal Tort Claims Act.

B. Nature of the Action.

Appellant's claims arose out of the construction of the Aleutian Homes housing project in Kodiak, Alaska, which was intended to provide housing for naval personnel stationed at Kodiak Naval Base and for civilians employed on the Base.

The basis of appellant's claims may be summarized as follows: By entering into a completion agreement under which construction of the project was to be concluded, Housing and Home Finance Agency (an agency

of the federal government hereinafter referred to as "HHFA") and the Housing and Home Finance Agency Administrator (hereinafter referred to as "the Administrator") entered into a fiduciary relationship with appellant, the project creditors and other interested parties. HHFA, its agents and employees breached this fiduciary relationship (1) by failing to obtain or provide permanent long-term financing of the project and (2) by satisfying its own interests as a creditor from the project assets to the exclusion of other interested parties, and specifically appellant (R. 69, 102).

Appellant seeks to recover the damages resulting from appellee's breach of its fiduciary duty (R. 70) under the provisions of the Federal Tort Claims Act. His damages include:

1. Certain payments made by him for which he would have been reimbursed if appellee had not breached its fiduciary duty, that is, (a) $75,000 paid to the project manager appointed under the completion agreement for overhead in the completion of the construction, (b) $164,594.80 paid to the Bank of California, N. A. pursuant to the provisions of the completion agreement, and (c) $35,955.02 paid to General Casualty Company of America in satisfaction of a judgment obtained by the latter for the unpaid premium on a bond executed in connection with the Aleutian Homes project (R. 1-13, 70).

2. The sum of $150,000, which appellant had advanced from his personal funds to pay expenses incurred during preparation for the project. (Shares of preferred stock of Aleutian Homes, Inc., amounting to $150,000 issued to appellant would have been redeemed if appellee had not breached its fiduciary duty (R. 13-14, 70).)

3. The sum of $428,127, as the damage to and destruction of the equity of Aleutian Homes, Inc. in the Aleutian Homes project (R. 15-16, 70).

C. Summary of Facts.

The facts which gave rise to this action are complicated, and consequently it is necessary to outline the same in more than the usual detail. Because of the large number of private and public agencies and organizations involved (see Ex 1177), the attention of the reader is directed to the opinion of the District Court (R. 79-89) in which a full statement of the same is set forth, as well as a summary of the relevant federal statutes.

The relevant federal agencies and personnel thereof will be referred to herein as follows:

1. Housing and Home Finance Agency, "HHFA."

2. The Housing and Home Finance Agency Administrator, "the Administrator" (also referred to by the District Court as "the Lender").

3. Federal Housing Administration, "FHA."

4. Federal National Mortgage Association, "FNMA."

5. Community Facilities Administration, "CFA" (formerly Community Facilities and Special Operations Branch, "CF&SO").

6. Reconstruction Finance Corporation, "RFC."

Background of Aleutian Homes Project. In 1949, discussions commenced among officials of the Navy, the Alaska Housing Authority, the City of Kodiak and the FHA relative to obtaining additional housing for naval and civilian personnel stationed and employed at Kodiak Naval Base. These officials considered the possibility of obtaining such housing under the provisions of the Wherry Act (National Housing Act, Title VIII, as amended), but discarded the same. They then caused studies to be made as to the prospects of constructing an off-base project, consisting of 350 to 400 houses, with conventional FHA assistance under the National Housing Act, Title II, Section 203, as amended (R. 53, 89).

In 1950 and 1951, arrangements were made to secure a site for the project, consisting of lands owned by the Federal Government and under the control of the Bureau of Land Management of the Department of the Interior. The property was to be conveyed to the Alaska Housing Authority, which would reconvey the same to

the City of Kodiak. The city was to use this property for construction of a housing project by a sponsor of its selection. Thereafter, the Alaska Housing Authority conveyed the land directly to the approved sponsor (R. 53, 89).

Streets for the project were to be provided by the city, water and sewer facilities and schools by the city and the Department of Interior through Alaska Public Works, and power by the local REA (R. 53-54, 89-90). In 1951, the city received a commitment from the Alaska Public Works program for funds to construct the water and sewer facilities (R. 54, 90).

In 1950 and 1951, the project site was surveyed and engineering was performed for the city and for a proposed sponsor, Raymond Lewis of Los Angeles. However, at the conclusion of the year 1951, Lewis was no longer interested (R. 54, 90).

Background of Appellant's Interest in Aleutian Homes Project. In 1951, appellant, a businessman in Portland, Oregon, financed a trip to Alaska by three associates, S. C. Horsley, R. A. Blanchard and G. K. Gosling, in order that they might ascertain whether a house panel invented by Horsley could be sold in the territory. Gosling on this trip contacted Lee C. Bettinger, Mayor of Kodiak, who thereupon met appellant and

interested him in becoming the sponsor of the proposed housing project (R. 54, 90).

In February, 1952, appellant caused Aleutian Homes, Inc. to be incorporated under the law of the State of Oregon. In February or March, 1952, the City of Kodiak approved the new corporation as sponsor of the project. The property chosen as the project site was thereafter conveyed to Aleutian Homes, Inc. by the Alaska Housing Authority (R. 54, 90).

Financing of Project. The proposed financing of the Aleutian Homes project had two phases: the long-term financing, and the short-term interim financing for construction purposes. These phases will be discussed in that order.

1. Long-Term Financing. The proposed long-term financing was to consist of funds advanced by a private lending agency, Brice Mortgage Co., to be secured by individual mortgages on each of the houses in the project. These funds in turn were to be based upon a firm commitment of FHA to insure such private mortgages and upon a further firm commitment of FNMA to purchase the mortgages so insured.

It was originally intended that the project be financed under the provisions of the National Housing Act, Title II, Section 203, as amended, which contem-

plated that a private mortgage agency would take out individual long-term mortgages on each house. Brice Mortgage Co. was selected as permanent mortgagee, but before it could sell any mortgages on the houses to FNMA, it of course first had to obtain an FHA commitment to insure such mortgages (R. 55, 91; and see Ex. 289/A2).

In accordance with FHA requirements, the Secretary of the Navy twice certified to FHA (in 1951, with respect to Raymond Lewis, and in 1952, with respect to Aleutian Homes, Inc.):

a. The Navy's critical need for 385 family dwellings to be used by military and civilian personnel at the Kodiak Naval Base;

b. The permanency of the Kodiak Naval Base; and

c. The ability of such personnel to pay rentals in the amounts of $100, $130 and $150 for two- and three-bedroom units (R. 55-56, 91; and see Ex. 115/48).

In 1952, FHA appraised the value of a completed 344-unit project at $5,904,250. In April of that year it issued a firm commitment to Brice Mortgage Co. to insure long-range individual mortgages on each home in a total amount of $4,706,400. This figure was based upon 80 per cent of the FHA appraised value (R. 55-56, 91-92).

In the same year, FNMA also issued a firm commitment to Brice Mortgage Co. to purchase the individual long-range mortgages at par after they were insured by FHA (R. 56, 92).

Aleutian Homes, Inc. was to use the amount received from the long-term financing for the following purposes:

a. Repayment of the $4,230,900 short-term interim construction loan from HHFA;

b. Payment of the costs of taking out permanent individual mortgages (estimated to be several hundred thousand dollars); and

c. Any balance remaining as capital (R. 56, 92).

2. Short-Term Interim Construction Loan. In 1952, Aleutian Homes, Inc. and Brice Mortgage Co., because of the difficulty of attracting risk capital to Alaska, were unable to obtain from private sources the funds required for construction of the project before long-term financing should be realized. As a result, they sought assistance from HHFA. Negotiations then ensued between Brice Mortgage Co., on behalf of Aleutian Homes, Inc., and CF&SO with respect to an interim loan for construction purposes (R. 56-57, 92).

In the latter part of 1952, Aleutian Homes, Inc. made its final application for an interim loan, and the

same was approved in January, 1953. This loan was in the sum of $4,230,900, constituting 90 per cent of the FHA and FNMA commitments for long-term financing. According to the application, the difference between the projected costs and the loan was to be supplied by Aleutian Homes, Inc. (R. 57, 92-93).

The loan authorization was signed by the Administrator and effectuated by documents required under a building loan agreement. These documents included appellant's guaranty of the loan agreement and the construction contract and a promissory note and deed of trust. A loan and disbursement agreement, executed on April 27, 1953, by appellant as president of Aleutian Homes, Inc., described the procedure for disbursements. The construction contracts and appellant's capital stock in Aleutian Homes, Inc. were assigned to the Administrator, as security. Appellant executed a standby agreement, individually and as president of Aleutian Homes, Inc. Performance bonds were executed in favor of Aleutian Homes, Inc. and the Administrator (R. 57-58, 93).

Upon the completion of the foregoing, firm arrangements finally had been made to provide the financing for this large housing project.

Contractual Arrangements for Construction. The contracts relating to construction of the Aleutian Homes

project under the HHFA interim loan were signed on April 27, 1953 (R. 58, 93).

Simultaneously, and in accordance with its understanding with HHFA, Aleutian Homes, Inc. entered into a general contract with Kodiak Construction Co. whereby the latter agreed to construct the project for $4,230,-900, the total maximum amount of the HHFA loan. Kodiak Construction Co. at the same time entered into the following subcontracts:

1. A "supply contract" with Alex B. Carlton, doing business as Carlton Lumber Company, for the purchase of prefabricated house packages;

2. A "site construction contract" with Pacific Alaska Contractors, Inc., for preparation of the site; and

3. A "construction contract" with Leo S. Wynans, Inc., for erection of the prefabricated houses on the prepared sites.

In addition, Kodiak Construction Co. entered into a contract with Coastwise Steamship Lines for transportation of prefabricated house packages and other materials from Portland, Oregon, to Kodiak. The total payment under these four contracts equaled $4,230,900 (R. 58-59, 93-94), the exact amount of the HHFA construction loan. At this stage all details appeared to have been ironed out successfully.

Cessation of Construction. In the summer of 1953, serious problems developed with respect to site preparation. As a result, a dispute arose between Kodiak Construction Co., acting through Leo S. Wynans, its agent, and Pacific Alaska Contractors, Inc., and the latter discontinued such work. Thereafter, Kodiak Construction Co., under Wynans' direction, furnished the labor and materials required under the site construction contract (R. 59, 94).

Financial problems arose in October and November, 1953, primarily due to lack of operating capital. November 6, 1953, when the project was approximately 75 per cent completed, Pacific Alaska Contractors, Inc. filed a lien claim against it for $150,504.43. Construction then ceased (R. 59, 94-95).

Completion Agreement. When construction was halted, various plans were considered by HHFA to remedy the situation. These included foreclosure, completion of the project by the sureties, demand upon appellant for performance, and introduction of additional money, either in conjunction with or in substitution for the Aleutian Homes, Inc. sponsorship. In addition, it was suggested that the project might be completed under a completion agreement (R. 59-60, 95).

Demand was made on appellant under his guaranty in November, 1953, but he did not comply (R. 60, 95).

Representatives of HHFA and Aleutian Homes, Inc. formulated a "completion agreement" in January, 1954, and it became effective in substantially the same form on April 23, 1954. During the intervening period, the consent necessary to effectuate the agreement was obtained (R. 60, 95).

The completion agreement (Ex. 583/1-140, 512/4) provided for completion of construction. It provided that appellant was not to have any further control or direction over the project until the then scheduled long-range financing came into effect, and further, that appellant was to advance substantial funds for the overhead of the project during the completion of construction. It also provided for payment of claimants, creditors and completion costs, to be made in four stages. In order to effectuate this agreement, Aleutian Homes, Inc., Kodiak Construction Co. and Leo S. Wynans Co., Inc. agreed that a project manager would be vested with exclusive authority to take any and all action in connection with the project that they would have been authorized to take. By the agreement, HHFA was vested with overall supervision and control of the project, including the receipt and disbursement of all funds of the project during the completion period and until the

long-range financing by the constituent agencies of HHFA had been effected (Exs. 583/1-140, 562/A-4, 891/A-21, 1021/A-22, R. 60, 95-96).

In the words of the District Court:

> "It is clear from all pertinent parts and provisions of the completion agreement, taken together and considered in light of the facts and circumstances surrounding the transaction at the time of execution, and the actions of the parties subsequent thereto, that the obligation of the Lender to furnish long-term financing was within the contemplation of the parties and was necessary to carry their intentions into effect." (R. 110)
>
> "Already I have mentioned that the only source of long-term financing in the area was through the federal loan agencies. In my opinion an agreement to provide such long-term financing was as much a part of the completion agreement as if it had been specifically mentioned. The providing of such financing was one of the duties of the Lender when it moved in and took complete control of the project." (R. 111)

Completion of Project. Harry M. Langton was appointed project manager under the completion agreement. He had prescribed duties, responsibilities and authority with respect to completion of construction and payment of claims (R. 60-61, 96), subject however, to the overall direction and control of HHFA.

Scott J. Cross was appointed construction superintendent (also by HHFA) to oversee the physical completion of the project (R. 61, 96).

By October 26, 1954, construction of 343 houses had been completed. The remaining house was never constructed for the reason that the lot upon which it was to be located was not suitable for building purposes. By April 12, 1955, 341 houses had passed final inspection by FHA. The two remaining houses were not acceptable for reasons which pertained to their foundations. At that time all claims in stages 1 and 2 were paid, as were a portion of the claims in stages 3 and 4 (R. 61, 96).

Long-Term Financing Commitments Permitted to Expire. Despite the fact that by April, 1955, FHA had approved virtually all the houses in the project, no permanent individual mortgages ever were taken out on any of these houses. In June, 1955, ostensibly in order to avoid payment of further commitment fees to FHA and FNMA, HHFA permitted the FHA commitments (to insure the mortgages) and the FNMA commitments (to purchase the same at par) to expire (R. 61, 96; Exs. 832/A-1-207, 849/49-4, 850/20, 851/A-20, 859/20). As late as November, 1955, HHFA still planned to obtain long-term financing so the short-term HHFA loan could be paid off and the project placed on a sound long-term

financial basis (Exs. 974/21, 976/21, 983/21; and see Ex. 1019/22).

Occupancy of Project. During the period from July, 1954, to August, 1959, the project was from 60 per cent to 95 per cent occupied, by personnel connected with the naval base at Kodiak (R. 62-63).

In the summer of 1957, the Navy indicated that it would reduce its service personnel by 10 per cent and its civilian personnel by approximately 33⅓ per cent (R. 63, 97).

Payments relating to Project Made and Received by Government Agencies. The advances made by HHFA to or for the benefit of Aleutian Homes, Inc. for project construction amounted to $4,192,717.10, from a total authorized loan of $4,230,900. The difference resulted from nonconstruction of one house (supra, page 16) and the failure of two others to pass FHA inspection (supra, page 16). From June 25, 1953, until November 24, 1953, that is, prior to the completion agreement, HHFA advanced $3,330,062.68. After the completion agreement became effective, it advanced an additional $862,654.42 on the project manager's requisition (R. 64, 98).

In March, 1955, HHFA authorized advances in addition to the original loan in an amount not to exceed

$160,000. These advances were to be utilized by the project manager for the care and preservation of the project. March 15, 1955, HHFA advanced $56,239.19 to the project manager. This sum was repaid on May 5, 1956, with 7 per cent interest (R. 64, 97-98).

HHFA received payments totalling $909,675.58 for or on behalf of Aleutian Homes, Inc. Individually, these payments were: (1) $35,134.14 from June 25, 1953, to October 31, 1953, prior to the completion agreement; (2) $402,241.44 from the project manager after he assumed his duties under the completion agreement; (3) $122,300 withdrawn by HHFA from the project manager's bank account immediately prior to foreclosure; and (4) $350,000 from the court-appointed receiver (R. 65, 98).

FHA received fees of $22,360 for its commitments to insure and extension of the same, and FNMA received fees of $106,422.77 for its commitments to purchase and extension (R. 65, 98).

Rentals Received by Project Manager. During the period from July 1, 1954, to June 14, 1957, the project manager received $1,114,800.20 in rentals (R. 65-66, 98-99).

Payments Relating to Project Made by Appellant Subsequent to Completion Agreement. After the com-

pletion agreement was formulated, appellant made the following payments relating to the Aleutian Homes project:

1. During 1954, 1955 and 1956, appellant made payments totaling $164,594.80 to The Bank of California, N. A., in payment of the latter's claim against the project, as set forth in the completion agreement. Certain of these payments were credited to principal and others to interest (R. 66, 99).

2. In 1954, appellant paid Brice Mortgage Company $35,000 in settlement of all claims of the latter and of Brice Realty Company against the project for alleged work done and services performed prior to execution of the completion agreement (R. 66-67, 99).

3. In 1954, appellant paid the Administrator $75,000 in accordance with provisions of the overhead agreement and the completion agreement requiring him to pay certain overhead expenses relating to the completion of the project (R. 67, 100).

4. September 18, 1956, appellant paid General Casualty Company $33,542.09 in satisfaction of a judgment obtained by the latter on July 24, 1956, for the unpaid premium on a bond issued on behalf of Kodiak Construction Co. and expenses. In defending this action, appellant incurred legal fees and other expenses in the sum of $2,412.93 (R. 67, 100).

Seizure of Funds and Foreclosure Suit. It should be noted that from approximately February, 1954, through May, 1957, HHFA through the project manager had absolute control and direction of this project. It made all the decisions, received and disbursed all funds. During this period it completed the project and thereafter rented the houses. It made the decision to permit the existing commitments for long-range financing to expire. By the terms of the completion agreement, appellant had absolutely no control or direction of the project during this period. In the words of the trial court:

> "* * * evidence is overwhelming that the Lender (HHFA) in truth and in fact took over absolute control of and proceeded with the completion of the project." (R. 106)

Furthermore, as the trial court indicated in its opinion, there was no available source of long-range financing for this project, except the United States itself or one of its agencies, a fact of which HHFA was well aware. (R. 103, 111).

Despite all this, and despite the fact that private capital was not available, HHFA on May 21, 1957 (Exs. 1142/A-22; 1144/23; 1150/A-32; and see Ex. 1025/A-32), without advance warning seized for its own account $122,300 out of the bank account

of the project. Immediately thereafter it instituted suit to foreclose its interim short-term loan mortgage in the United States District Court for the District of Alaska. This suit was brought in the name of the United States of America against Aleutian Homes, Inc., Pacific Alaska Contractors, Inc., Alex B. Carlton, doing business as Carlton Lumber Company, the city of Kodiak, certain individuals as trustees, and "Also all other persons or parties unknown claiming any right, title, estate, lien or interest in the real estate described in the complaint herein" (R. 67-68, 100-101). June 14, 1957, M. G. Gebhart was appointed receiver of the property on the plaintiff's motion. June 20, 1958, the court authorized the receiver to pay HHFA $200,000 from the proceeds of operating the project, and this was thereafter done. On or about September 12, 1958, the plaintiff amended its complaint, adding the Territory of Alaska, Kodiak Construction Co., Leo S. Wynans Co., Inc., and United States of America as defendants. On or about April 10, 1959, the court authorized the receiver upon the latter's request to pay HHFA $150,000 from the proceeds of operating the project, and he subsequently did so (R. 68, 101).

From the foregoing it is evident that by May, 1957, appellee had made its decision to foreclose appellant's investment in the project and ultimately to obtain title

to the entire project through foreclosure proceedings. By so doing, it effectively renounced its previously stated position that long-range financing would be provided for the project so that the short-term interim construction loan of HHFA could be repaid.

D. Findings and Conclusion of District Court.

The findings of the District Court, which are undisputed, are in part as follows:

1. Appellee could and did occupy the status of a fiduciary.

> "I am of the opinion that the Lender could legally occupy the legal status of a fiduciary in connection with the completion of the housing project in question. Furthermore, I find and hold that the Lender took over full and complete control of such project and, in so doing, was acting in a fiduciary capacity with the plaintiff" (R. 108-109).

2. Appellee breached its fiduciary duty to appellant.

> "I have already concluded that defendant could act as a fiduciary and was acting in a fiduciary or confidential capacity in assuming control over the completion of the project and the long-term financing. Assuming, arguendo, and I would so hold if I felt I had jurisdiction, that defendant in truth and in fact breached its duty in failing to provide, without justification, said long-term financing, is said breach of duty 'negligent or wrongful act or omission' within the meaning of the phrase as used in the Federal Tort Claims Act?" (R. 112)

However, the court concluded that breach of fiduciary duty does not constitute tortious conduct within the meaning of the Federal Tort Claims Act (R. 113-114), and that it therefore does not have jurisdiction of appellant's claims (R. 116, 117).

E. Question Presented.

In the foregoing state of facts, the following question is presented for decision on this appeal:

Under the provisions of the Federal Tort Claims Act, does the District Court have jurisdiction of appellant's claims for damages arising from appellee's breach of fiduciary duty?

SPECIFICATION OF ERROR

The District Court committed error when it concluded as a matter of law that it did not have jurisdiction of appellant's claims under the Federal Tort Claims Act and thereupon dismissed appellant's complaint and the causes of action set forth in said complaint.

SUMMARY OF ARGUMENT

I. The District Court committed an error of law when it held that it does not have jurisdiction of appellant's claims under the provisions of the Federal Tort Claims Act and thereupon dismissed appellant's complaint and the causes of action therein set forth.

A. Breach of fiduciary duty constitutes tortious conduct for which appellant would be liable, if a private person, under the applicable law.

B. Apart from the provisions of the Federal Tort Claims Act, appellee is amenable to suit for breach of fiduciary duty.

C. Governmental immunity from liability for breach of fiduciary duty has been waived under the provisions of the Federal Tort Claims Act.

1. Breach of fiduciary duty is within the scope of the clear and unequivocal provisions of the Federal Tort Claims Act, which constitutes a waiver of governmental immunity from liability as to all torts which would give rise to individual liability except those expressly removed from the operation of such waiver.

2. The Congressional intent was not such as to exclude breach of fiduciary duty from the scope of the Federal Tort Claims Act.

3. The provisions of the Federal Tort Claims Act must be given a liberal construction.

4. The cases relating to the Federal Tort Claims Act show that the Act constitutes a waiver of governmental immunity from liability for breach of fiduciary duty.

II. In the event that this court affirms the conclusion of the District Court that breach of fiduciary duty is not

within the purview of the Federal Tort Claims Act, it should require the District Court to transfer this case to the Court of Claims.

ARGUMENT

Point I

The District Court committed an error of law when it held that it does not have jurisdiction of appellant's claims under the provisions of the Federal Tort Claims Act and thereupon dismissed appellant's complaint and the causes of action therein set forth.

After finding that appellee was in a fiduciary relationship with appellant, and that it had breached its fiduciary duty to him (supra, page 22), the District Court stated the issue thus: "* * * is such breach of duty a 'negligent or wrongful act or omission' within the meaning of the phrase as used in the Federal Tort Claims Act?" (R. 112). The court answered "No," and dismissed appellant's complaint. Appellant respectfully urges that the answer should have been "Yes," and that judgment should have been entered in his favor.

Under the provisions of the Federal Tort Claims Act 28 USCA Section 1346 (b)

the District Courts have exclusive jurisdiction of

> "* * * civil actions on claims against the United States, for money damages, accruing on and

> after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

In concluding that breach of fiduciary duty is not within the scope of these provisions, the court reasoned as follows:

1. Immunity from liability as to all torts was not waived under the Act;

2. Immunity was waived only as to the "ordinary common-law type of tort," i.e., negligence; and

3. If violation of fiduciary duty constitutes tortious conduct, it is not within the provisions of the Act, as so limited (R. 112-116).

However, the conclusion must fail, for the reasoning is not correct. Breach of fiduciary duty is a tort under Oregon law, and it is conduct for which governmental immunity from liability was waived under the Federal Tort Claims Act.

A. Breach of fiduciary duty constitutes tortious conduct for which appellee would be liable, if a private person, under the applicable law.

Before considering the scope of the Federal Tort Claims Act specifically, it is necessary to determine whether the breach of fiduciary duty committed by appellee's employee constitutes conduct for which it would be liable, if a private individual, under the law of the State of Oregon. This problem is, however, easily resolved. Breach of fiduciary duty is an actionable tort under Oregon law, and, consequently, if appellee were a private individual, it would be liable therefor to appellant.

Breach of fiduciary duty is generally regarded as tortious conduct.

4 Restatement of Torts, Section 874

> "A person standing in a fiduciary relation with another is liable to the other for harm resulting from a breach of duty imposed by such relation.
>
> "Comment: * * *
>
> "b. A fiduciary who commits a breach of his duty as a fiduciary is guilty of tortious conduct to the person for whom he should act."

This rule obtains in the state of Oregon.

Harper v. Interstate Brewery Co. (1942) 168 Or 26, 120 P2d 757

This was a tort action in which the plaintiffs alleged that the defendants had breached their fiduciary

duty to the plaintiffs. This fiduciary duty related to certain property conveyed by the plaintiffs to the defendants in reliance upon certain representations made by the latter. In affirming a judgment for the plaintiffs, the court stated (168 Or 42, 120 P2d 764):

> "The contract between plaintiffs and the defendant brewery expressly required the defendant to 'use its best efforts to obtain as much as it reasonably can for said property', but that is not all. Pursuant to the contract the defendant company received deeds as security with a purported power of sale. It thereby assumed a relationship to the plaintiffs upon which the law imposed a duty to act in good faith, using reasonable efforts to make the sale beneficial to the mortgagor by obtaining the best price reasonably obtainable. This was a duty 'independent of contract' imposed by law and irrespective of similar contractual provisions. *A breach of that duty was an actionable tort* under the authorities cited." (emphasis added)

And see

> *Fergison v. Belmont Conv. Hospital*
> (1959) 217 Or 453, 464-466,
> 343 P2d 243, 247-248

There is, therefore, no doubt that if appellee were a private individual, its conduct would have given rise to tort liability under Oregon law.

B. Apart from the provisions of the Federal Tort Claims Act, appellee is amenable to suit for breach of fiduciary duty.

As the facts of this case bring it within the scope of the Federal Tort Claims Act, our principal concern is with that statute. However, it must be noted that even apart from the provisions of the Federal Tort Claims Act, appellee would be amenable to suit by appellant for its breach of fiduciary duty.

The statutory powers of the Administrator (R. 82-84) show that he is clothed with all the attributes of a private enterprise "launched * * * into the commercial world," and that as such he is given the power to "sue and be sued." Patently, in vesting him with such rights and powers, Congress removed his governmental immunity from liability for conduct which would give rise to liability on the part of a private enterprise.

> *Federal Housing Administration v. Burr*
> (1939) 309 US 242, 245, 84 Led 724, 728-729

And see

> *Reconstruction F. Corp. v. J. G. Menihan Corp.*
> (1940) 312 US 81, 85 Led 595
>
> *Keifer & Keifer v. Reconstruction Finance Corp.*
> (1938) 306 US 381, 83 Led 784

Acting in his capacity as a private entrepreneur, the Administrator committed a breach of his fiduciary duty to appellant. A private enterprise would be liable for such conduct, and, in the absence of the Federal Tort Claims Act, appellee would be similarly liable. However, as breach of fiduciary duty is within the scope of the Act, appellant's remedy must perforce be under that statute.

28 USCA Section 2679(a)

> "The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive."

C. Governmental immunity from liability for breach of fiduciary duty has been waived under the provisions of the Federal Tort Claims Act.

The tort committed by appellee, i. e., breach of fiduciary duty, is clearly within the scope of the Federal Tort Claims Act, and, as a result, governmental immunity from liability for such conduct has been waived. To limit the scope of the Act so as to exclude this tort from its provisions would be contrary to the unequivocal language of the Act and to judicial decision relative to the same.

1. Breach of fiduciary duty is within the scope of the clear and unequivocal provisions of the Federal Tort Claims Act, which constitutes a waiver of governmental immunity from liability as to all torts which would give rise to individual liability except those expressly removed from the operation of such waiver.

In order to determine whether breach of fiduciary duty is within the scope of the Federal Tort Claims Act, the first step is to examine the language of the Act. This reveals a clear, unambiguous statute waiving governmental immunity from liability as to all torts which would give rise to individual liability other than those expressly excepted from such waiver.

The Federal Tort Claims Act is part of a statute vesting the District Courts with jurisdiction over certain actions to which the United States is a defendant.
28 USCA Section 1346

> "(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:
>
> "(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;
>
> "(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of

Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

"(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

And see

28 USCA Section 2674

"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, * * *"

When the provisions of the Federal Tort Claims Act,

28 USCA Section 1346 (b)

are examined alone, it appears that the language thereof is sufficiently broad to include any civil wrong in-

cluding actions *ex contractu* and those *ex delicto.* However, when the statute is considered as a whole, it is apparent that such is not the case, and it is a simple matter to delineate the wrongs actually covered by the Act.

A perusal of the preceding subdivision of the chapter,

28 USCA Section 1346 (a) (2)

reveals that actions on contract not exceeding $10,000 in amount are covered by that subdivision, and are within the concurrent jurisdiction of the District Courts and the Court of Claims. Additionally, under the provisions of

28 USCA Section 1491

the Court of Claims has jurisdiction "to render judgment upon any claim against the United States founded * * * upon any express or implied contract with the United States." As contract actions are fully treated by these provisions, it is manifest that an action *ex contractu* is not included in the "negligent or wrongful act or omission" of subdivision (b).

With actions *ex contractu* eliminated from consideration, the Act can only apply to actions sounding in tort, that is, actions *ex delicto.* Thus, "tort" has been defined as follows:

Black's Law Dictionary (4th Ed, 1951) page 1660

> "A private or civil wrong or injury. A wrong independent of contract."

Prosser on Torts (2d Ed, 1955) Section 1, page 2

> "* * * a civil wrong, other than breach of contract, for which the court will provide a remedy in the form of an action for damages."

Furthermore, the provisions of the Act, which embrace the "negligent or wrongful act or omission" of government employees, patently extend to *all tortious conduct* which would give rise to liability if the United States were a private individual. The language employed admits of no exceptions. This conclusion is confirmed when it is observed that Congress expressly excluded certain types of tortious conduct from the operation of the statute. Thus, see

28 USCA Section 2680

> "The provisions of this chapter and section 1346 (b) of this title shall not apply to—
>
> "(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an

employee of the Government, whether or not the discretion involved be abused.

"(b) Any claim arising out of the loss, miscarriage or negligent transmission of letters or postal matter.

"(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

"(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

"(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of title 50, Appendix.

"(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

"(g) Any claim arising from injury to vessels, or to the cargo, crew, or passengers of vessels, while passing through the locks of the Panama Canal or while in Canal Zone waters.

"(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

"(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

"(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

"(k) Any claim arising in a foreign country.

"(l) Any claim arising from the activities of the Tennessee Valley Authority.

"(m) Any claim arising from the activities of the Panama Railroad Company."

Subdivision (g) was repealed in 1950, and at the same time subdivision (m) was amended and a new subdivision (n) added, as follows:

"* * * (m) Any claim arising from the activities of the Panama Canal Company.

"(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives."

This specific enumeration of classes of tortious conduct removed from the operation of the Act definitely belies any suggestion that other classes of torts are excepted from its provisions. See, in this connection, *Employers' Fire Ins. Co. v. United States* (9 Cir., 1948) 167 F2d 655

This case involved the negligence aspect of the Federal Tort Claims Act, and specifically the question of whether a subrogated claim is within the scope of the Act. This court stated at page 656:

"In the Federal Tort Claims Act, Congress,

though granting jurisdiction generally to the Federal Courts to render judgment on 'any claim', designated twelve categories of claims of which the Federal Tort Claims Act was not meant to apply. Claims of subrogees were not included therein. *Had Congress intended to exclude subrogated claims, it would have undoubtedly designated them as one of the categories which the Act was not meant to cover.*" (emphasis added)

The same question was before the court in

Wojciuk v. United States (ED Wis, 1947) 74 F Supp 914, 916

"Congress exercised great care in designating twelve different categories of claims which the Federal Torts Claims Act was not intended to cover. The claims here in question were not included in any such classification. The familiar maxim of interpretation, expressio unius est exclusio alterius, may be invoked. It is my opinion that plaintiff Casualty Company, as a subrogee of Wojciuk, is a proper claimant under the act."

And see

Richards v. United States (1962) 369 US 1, 7 Led2d 492

This case involved a question as to the applicable law in an action brought under the Federal Tort Claims Act which was based upon an act of negligence oc-

curring in one state and resulting in death and injury in another. The court stated (369 US 6-7, 7 Led2d 496-497):

> "*The Tort Claims Act was designed primarily to remove the sovereign immunity of the United States from suits in tort and, with certain specific exceptions, to render the Government liable in tort as a private individual would be under like circumstances.* It is evident that the Act was not patterned to operate with complete independence from the principles of law developed in the common law and refined by statute and judicial decision in the various States. Rather, it was designed to build upon the legal relationships formulated and characterized by the States, and, to that extent, the statutory scheme is exemplary of the generally interstitial character of federal law. If Congress had meant to alter or supplant the legal relationships developed by the States, it could specifically have done so to further the limited objectives of the Tort Claims Act. That is, notwithstanding the generally interstitial character of the law, Congress, in waiving the immunity of the Government for tortious conduct of its employees, could have imposed restrictions and conditions on the extent and substance of its liability." (emphasis added)

Consequently, the courts should not read additional exceptions into the Act.

Rayonier Inc. v. United States (1957) 352 US 315, 320, 1 Led2d 354, 358-359

"There is no justification for this Court to read ex-

emptions into the Act beyond those provided by Congress. If the Act is to be altered that is a function for the same body that adopted it."

Analysis of the plain provisions of the Federal Tort Claims Act thus leads inevitably to the following conclusion: Because breach of fiduciary duty is a tort for which the United States would be liable if it were a private individual (supra, pages 26-28), it is within the scope of the Act. It was not included in the list of torts excepted from the application of the Act, and it is therefore within the waiver of governmental immunity from liability effectuated by the Act.

2. The Congressional intent was not such as to exclude breach of fiduciary duty from the scope of the Federal Tort Claims Act.

In concluding that the Federal Tort Claims Act encompasses only negligent conduct, the District Court relied upon alleged legislative intent to limit the waiver of governmental immunity from liability for torts grounded on negligence. This reliance is misplaced. As appellant has demonstrated (supra, pages 31-39), the provisions of the Act are clear and unequivocal, embracing other wrongful acts or omissions, such as breach of fiduciary duty, as well as negligent acts or omissions. Consequently, reference to the legislative in-

tent is not necessary. In any event, however, the intent of Congress was not to confine the act in the manner suggested by the District Court, but was rather in complete accordance with the clear language of the Act.

The Federal Tort Claims Act was enacted in order to relieve Congress from the necessity of determining the merits of myriad private bills presented for the redress of individual tort claims, a process both inequitable and burdensome. Of course, a large percentage of the claims presented in this way arose out of the negligent conduct of government employees, and there is no doubt that the Act does cover such claims, a fact which Congress discussed in some detail. This does not, however, militate against the fact that the Act also covers tort claims arising from other wrongful conduct of government employees, such as breach of fiduciary duty.

In discussing legislative intent, the District Court quotes (R. 113) from

Dalehite v. United States (1952) 346 US 15, 97 Led 1427

a case which has been abandoned or overruled by the Supreme Court. See

> *Indian Towing Co. v. United States* (1955) 350 US 61, 100 Led 48
>
> *Rayonier Inc. v. United States* (1957) 352 US 315, 1 Led2d 354

In the *Dalehite* case, the court states (346 US 27-28, 97 Led 1436-1437):

> "The legislative history indicates that while Congress desired to waive the Government's immunity from actions for injuries to person and property occasioned by the tortious conduct of its agents acting within their scope of business, it was not contemplated that the Government should be subject to liability arising from acts of a governmental nature or function. Section 2680 (a) draws this distinction. Uppermost in the collective mind of Congress were the ordinary common-law torts. Of these, the example which is reiterated in the course of the repeated proposals for submitting the United States to tort liability is 'negligence in the operation of vehicles.' "

At most, this statement would indicate that "ordinary common-law torts" were uppermost in Congressional thinking, and that negligence in the operation of vehicles received frequent mention as an example of the coverage of the Act. However, it is not clear as to what constitutes an "ordinary common-law tort," or even whether the example fits into this category. Certainly, many common-law torts arose out of wrongful conduct which was not negligent in character, such as trespass, and breach of fiduciary duty may be regarded as being such a tort. Furthermore, if negligence were "uppermost" in Congress' collective mind, this would not indicate that other wrongful conduct was not also within its thinking.

In addition, the District Court quotes (R. 112-114) a statement made to a Congressional committee by Francis M. Shea, Assistant Attorney General, again referring to the "ordinary common-law type of torts" and citing negligence in vehicular operation as an example of the same. This does not necessarily enlighten us as to the Congressional intent, and, at any rate, the same criticisms are applicable.

The legislative history of the Federal Tort Claims Act is extensive, going back for a number of years prior to its enactment in 1946. Consequently, an examination of some of the remarks made by various members of the Congress during the course of this history are helpful. Thus, see

69 Congressional Record (70th Congress, First Session, 1928)

On this occasion, the House of Representatives had resolved itself into a Committee of the Whole House to consider H. R. 9285, to provide for settlement of claims against the United States on account of property damage, personal injury or death. The following statements were made:

> "Mr. RAMSEYER. The committee reporting out this bill goes beyond negligence and includes, and the gentleman will see on page 1, line 8, and page 2, line 2, not only negligence but wrongful acts or omissions.

"Mr. BULWINKLE. Yes.

"Mr. RAMSEYER. Now wrongful does not necessarily involve negligence, neither does omission.

"Mr. BULWINKLE. That is true.

"Mr. RAMSEYER. Under the act where you make the Government liable for injury to private property not in excess of $1,000, you specifically state, 'Caused by negligence of an officer or employee.'

"Mr. BULWINKLE. Yes.

"Mr. RAMSEYER. You expand in this bill beyond what you went under this limited liability of $1,000 to private property.

"Mr. BULWINKLE. We do.

"Mr. RAMSEYER. Now, what is your reason for it?

"Mr. BULWINKLE. The reason for it is in order that these meritorious cases, whether they arise from negligence, wrongful acts, or wrongful omissions of any of the agents of the Government shall be settled or shall be adjudicated by some one instead of waiting from year to year on Congress." (page 2191)

"Mr. RAMSEYER. * * *

"We first attempted to relieve the Committee on Claims in 1922 when we conferred jurisdiction upon the heads of the departments to adjudicate claims up to a thousand dollars for injury to private property on account of the negligence of Government employees. I ask members to note this language in that statute:

> 'caused by the negligence of any officer or employee.'

"In this bill we go further. We confer jurisdiction for damages or loss to private property—

'caused by the negligence or wrongful act or omission of any officer or employee of the Government.'

"There can be no question that we are widening the scope of the statute that we passed in 1922." (page 2203)

86 Congressional Record (76th Congress, Third Session, 1940)

Here, the House of Representatives had resolved itself into a Committee of the Whole House to consider H. R. 7236. The following was a discussion with Mr. Celler, Chairman of the Committee on the Judiciary:

"Mr. O'CONNOR. I believe the bill is a good one. However, I should like to get the gentleman's interpretation of just what limitation is to be placed in the bill in the nature of the actions that may be determined. For instance, I call the attention of the gentleman to line 4 on page 2, beginning with the words—

'Caused by the negligent or wrongful act or omission of any officer or employee of the United States, including any member of the military and naval forces, while acting within the scope of his office or employment.'

"What I am trying to get at is, does this bill limit the nature of the claims to the acts specified in that clause?

"Mr. CELLER. No. In the first place, this section, section 1, involves the settlement of claims, not actions brought.

"Mr. O'CONNOR. In other words, is there any limitation in this bill as to the nature of the claims that may be passed upon by the department heads as outlined in the bill?

"Mr. CELLER. Yes; if the gentleman will look at section 303, on page 6, and the pages following, he will find this language:

'The provisions of this act shall not apply to'

"And then we enumerate the types of claims that cannot be brought or settled under this bill?

"Mr. O'CONNOR. Other than that, the bars are down?

"Mr. CELLER. Absolutely." (page 12019)

In the course of this same discussion, it became apparent that Congress considered that assault and battery would have been covered by the Act in the absence of the express exception now contained in

28 USCA Section 2680(h)

"Mr. O'CONNOR. Paragraph 9, on page 7, it seems to me ought to be stricken out. Suppose an officer goes into one of the parks or goes on an Indian reservation and gets into trouble there with an Indian or somebody else and beats him up and assaults him, why should not an action of that kind be determined by a court or be determined in the manner provided rather than requiring a special act here in Congress?

"Mr. CELLER. We considered those possibilities that the gentleman has mentioned, and we were afraid that there would be terrifically exaggerated claims brought if we took away those exemptions, and that is why we included the phrase as you have it there." (page 12020)

Certainly, this is not a tort grounded in negligence.

A recent comment made by the Supreme Court will serve to summarize the legislative intent.

Richards v. United States (1962) 369 US 1, 8, 7 Led2d 492, 497-498

> "* * * The concern of Congress, as illustrated by the legislative history, was the problem of a person injured by an employee operating a government vehicle *or otherwise acting within the scope of his employment*, * * *" (emphasis added)

Clearly, the intent of Congress was not such as to exclude wrongful conduct other than negligence from the operation of the Federal Tort Claims Act. Breach of fiduciary duty is therefore within the scope of the conduct encompassed by the Act.

3. The provisions of the Federal Tort Claims Act must be given a liberal construction.

Statutory consent to sue the sovereign is to be construed liberally. In the oft-quoted words of Judge Cardozo:

Anderson v. John L. Hayes Const. Co. (1926) 243 NY 140, 153 NE 28, 29-30

> "The exemption of the sovereign from suit involves hardship enough, where consent has been withheld.

> We are not to add to its rigor by refinement of construction, where consent has been announced."

And see

United States v. Shaw (1939) 309 US 495, 501, 84 Led 888, 892

> "A sense of justice has brought a progressive relaxation by legislative enactments of the rigor of the immunity rule. As representative governments attempt to ameliorate inequalities as necessities will permit, prerogatives of the government yield to the needs of the citizen. * * * When authority is given, it is liberally construed."

These statements are particularly apposite to a consideration of the Federal Tort Claims Act, and they have often been quoted or cited by the courts in discussing the provisions of the Act.

United States v. Yellow Cab Co. (1950) 340 US 543, 554-555, 95 Led 523, 532

United States v. Aetna Cas. & S. Co. (1949) 338 US 366, 383, 94 Led 171, 186

American Exch. Bank of Madison, Wis. v. United States (7 Cir., 1958) 257 F2d 938, 941

Somerset Seafood Co. v. United States (4 Cir., 1951) 193 F2d 631, 634

Rushford v. United States (ND NY, 1950) 92 F Supp 874, 875

Consequently, the Act must not be whittled away by stringent construction, but, rather, it must be liberally construed to afford full efficacy to its provisions. When this guiding principle is applied to the clear provisions of the Act, the conclusion is unavoidable. Breach of fiduciary duty is one of the torts for which governmental immunity from liability has been waived.

4. The cases relating to the Federal Tort Claims Act show that the Act constitutes a waiver of governmental immunity from liability for breach of fiduciary duty.

In construing the provisions of the Federal Tort Claims Act, the District Court limited the words "negligent or wrongful act or omission" to negligent conduct (R. 115), and thus concluded that the Act does not encompass breach of fiduciary duty. Appellant has shown (supra, pages 31-39) that this construction is contrary to the clear provisions of the Act. It is equally certain that the court's holding is contrary to the relevant body of judicial decision.

It is true that most litigation under the Act arises in the field of negligence, and this fact must be considered when examining the cases construing the Act. However, it is by no means true that the operation of the Act is limited to cases of negligent conduct, and the falsity of this suggestion is made apparent by a consideration of the relevant authorities. The Act does

extend to more than negligent conduct, and it does encompass breach of fiduciary duty.

Before examining the cases, it is well to note with some precision the meaning of the words "negligent" and "wrongful." Thus, "negligent" has been defined as follows:

Webster's New International Dictionary (2d ed, 1950)

> "Guilty of, or given to, neglect or disregard; neglectful; characterized by negligence; heedless; culpably careless; as in *negligent* order; *negligent* of traffic rules."

Webster's Third New International Dictionary (1961)

> "1. That is marked by or given to neglect: that is neglectful esp. habitually or culpably * * *; *specif*: not exercising the care usu. exercised by a prudent person * * *."

"Wrongful" is defined:

Webster's New International Dictionary (2d ed, 1950)

> "1. Full of wrong; injurious; unjust; unfair; as *wrongful* acts or dealings.
>
> "2. Not rightful, esp. in law; unlawful, illegitimate; without legal sanction * * *."

Webster's Third New International Dictionary (1961)

> "1: full of wrong: INJURIOUS, UNJUST, UNFAIR * * *
>
> "2: not rightful esp. in law: having no legal sanction: UNLAWFUL, ILLEGITIMATE * * *."

It is clear, then, that, although a negligent act may be wrongful, all wrongful conduct is not negligent. The words "wrongful act or omission" are broader in scope than the words "negligent act or omission." See *Clark's Adm'x v. Louisville & N. R. Co.* (1897) 101 Ky 34, 39 SW 840

In discussing the words "wrongful act" as they appeared in the phrase "negligent or wrongful act" of the wrongful death act, the court stated at page 841:

> "* * * It is a more comprehensive term than the word 'negligence.' Necessarily, in every case of negligence there must be a 'wrongful act,' either of omission or of commission. There may be an actionable 'wrongful act' which is not the result of negligence; neither is there an element of negligence in it. It may be willfully or unintentionally done. The words 'wrongful act' denote or embrace all acts other than those constituting mere negligence which are wrong, * * *."

Consequently, when the District Court equated a "negligent" act or omission with a "wrongful" act or

omission, it rendered the latter language meaningless. Such construction is patently erroneous.

Parcell v. United States (SD W. Va., 1951) 104 F Supp 110, 116

> "* * * Under Sec. 1346(b) of the Act the United States is made liable for '* * * loss of property, or personal injury or death caused by the negligent *or wrongful* act or omission of any employee of the Government * * *.' (emphasis added.) The words, 'wrongful act,' in that portion of the statute set out above must be given some meaning. To say that 'wrongful act' is a tautological phrase meaning negligence is inconsistent with the general rule of statutory interpretation, namely, that no portion of a statute susceptible of meaning is to be treated as superfluous."

Thus, in commenting upon the meaning of the word "wrongful" as used in the Act, the courts have uniformly indicated that it encompasses more than negligent conduct.

Hatahley v. United States (1955) 351 US 173, 181, 100 Led 1065, 1074

> "We note also that § 1346(b) provides for liability for 'wrongful' as well as 'negligent' acts. In an earlier case the Court has pointed out that the addition of this word was intended to include situations like this involving ' "trespasses" which might not be considered strictly negligent.' "

Aleutco Corporation v. United States (3 Cir., 1957) 244 F2d 674, 678

> "The act was primarily directed towards eliminating the congressional preoccupation with the enactment of private bills compensating individuals for losses sustained as a result of the negligent torts of government employees. S.Rep. No. 1400, 79th Cong. 2d Sess. (1946). However, the act was written broadly to include losses 'caused by the *negligent or wrongful* act or omission of any employee of the government.' (Emphasis supplied.) See *Hatahley v. United States*, 1956, 351 U.S. 173, 181, 76 S.Ct. 745, 100 L.Ed. 1065."

The District Court suggests (R. 115) that the word "wrongful" has been deprived of its full meaning through inferential application of the rule of ejusdem generis. However, by definition that rule is not relevant to a consideration of the provisions of the Federal Tort Claims Act.

Black's Law Dictionary (4th ed, 1951) page 608

> "EJUSDEM GENERIS. * * *
>
> "In the construction of laws, wills, and other instruments, the 'ejusdem generis rule' is, that where general words follow an enumeration of persons or things, by words of a particular and specific meaning such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned. * * * The rule, however, does not necessarily require

that the general provision be limited in its scope to the identical things specifically named. Nor does it apply when the context manifests a contrary intention."

Furthermore, the District Court does not cite any cases in which this rule has been applied to the provisions of the Act. It is clear that this case must be determined upon some basis other than the use of ejusdem generis.

The pertinent inquiry is, therefore, as to whether the courts permit recovery under the Federal Tort Claims Act for damages resulting from wrongful conduct other than negligence. The answer is clearly "Yes."

Hatahley v. United States (1955) 351 US 173, 100 Led 1065

This was an action brought by eight families of Navaho Indians under the Federal Tort Claims Act to recover damages for destruction of their horses by agents of the federal government. The Supreme Court reversed the judgment of the Court of Appeals for the Tenth Circuit, which had in turn reversed the judgment of the District Court allowing recovery.

After the enactment of the Taylor Grazing Act, permits were issued to white livestock operators, permitting

them to graze their animals on lands used by the Indians. Disputes thereafter arose between the two, resulting in suits by the government and by the stockmen to remove the Indians from such lands. In addition, however, government agents carried on an active campaign to round up and destroy the Indians' horses. In so doing, they purportedly acted under the provisions of the Utah Abandoned Horse Statute, but the record showed that the statute was applied in a discriminatory manner against the Indians.

The Supreme Court held that the Utah Abandoned Horse Statute was not properly invoked, and, further, that there was liability under the provisions of the Federal Tort Claims Act. In so holding, it noted that the word "wrongful" as used in the Act includes conduct which is not negligent in character (see supra, page 51).

The District Court dismissed the *Hatahley* case as one which is "closely related to negligence" (R. 115). However, as this case involves a trespassory invasion which is not akin to negligence, it cannot be disposed of in this summary fashion.

Aleutco Corporation v. United States (3 Cir., 1957) 244 F2d 674

This was an action brought under the Federal Tort Claims Act to recover damages for conversion of war surplus property which the plaintiff had purchased from the government. Judgment for the plaintiff was affirmed.

In May, 1948, the plaintiff purchased from the government miscellaneous surplus property located in the Aleutian Islands and in the custody of the Navy. The property was to be removed by November 30, 1948, but the removal date was later extended to October 30, 1949, and the plaintiff did thereafter take portions of the property. March 22, 1951, the plaintiff received permission from the Navy to remove additional property, but when the plaintiff's representatives went to the site to arrange for such removal, they were refused permission by a civilian employee of the Navy. The matter of ownership was referred to the Navy Department, and the plaintiff thereafter wrote the General Services Administration that (1) the War Assets Administration had advised it that there was no urgency for removal of the property and (2) the commander of the naval base at Adak, Alaska, had given it specific written permission for an indefinite extension of time for such removal. Various correspondence and conferences ensued, following which the plaintiff was notified that it had forfeited any rights to the property, and the same was sold to another firm. This action resulted.

After noting the use of the word "wrongful" as well as of "negligent" in the Federal Tort Claims Act (see supra, page 52), the court stated at pages 678-679:

> "Aleutco's complaint is a sufficient statement of a cause in tort for conversion, and it would seem that Aleutco could have equally well made out a complaint for breach of contract. See 3 Williston on Sales § 595 (Rev. Ed. 1948). Aleutco has chosen to prosecute its action on the basis of tort in the District Court. That it failed to avail itself of an action in the Court of Claims is not a valid jurisdictional objection. So long as immunity of the United States to suit depended upon the distinction between tort and contract, the Supreme Court was careful to preserve the distinction. Thus prior to the Tort Claims Act, rather than extend the liability of the United States under the Tucker Act, the common law privilege of waiving the tort and suing on the contract implied by law was denied. * * * However, requiring strict enforcement of the distinction in the situation presented in the instant case would be contrary to the purpose for which the Tort Claims Act was enacted. The waiver of the immunity of the United States to suit was the primary purpose of the various enactments conferring jurisdiction on the federal courts to hear such suits. There is little doubt as to Aleutco's ability under the statutes to bring this suit. While only cases 'not sounding in tort' are cognizable in the Court of Claims, the jurisdiction of that court has been sustained where elements of both contract and tort were involved in the claim. * * * Likewise, as a result of the Tort Claims Act, there is no policy in the law which requires that the forum of the district court be denied a plaintiff who pleads and proves a classic case in tort. To do so would neither further nor accomplish Congress' purpose in waiving the immunity of the United States to suit."

Again, the District Court in the case at bar attempted to bring the *Aleutco* case within the purview of its holding by stating that the latter case is "closely related to negligence" (R. 115). Appellant respectfully disagrees with this analysis. The conduct complained of in the *Aleutco* case was, as the court therein indicated, "wrongful," but not negligent.

United States v. Praylou (4 Cir., 1953) 208 F2d 291

This was an action brought under the provisions of the Federal Tort Claims Act to recover damages resulting when an airplane operated by government employees on government business fell from the sky. Judgments for the plaintiffs were affirmed.

Liability was under the provisions of the Uniform Aeronautics Act, which provided for absolute liability regardless of negligence where injuries were caused by the descent of an airplane. The court noted that the effect of this statute was to make the infliction of injury or damage by the operation of an airplane of itself a wrongful act giving rise to liability. It held that cases involving liability of this sort are clearly within the purview of the Federal Tort Claims Act.

The *Praylou* case was followed in

Hahn v. U.S. Airlines (ED NY, 1954) 127 F Supp 950

which also involved damages resulting from the crash

of a government airplane. The court therein stated at pages 951-952:

> "It is hard to see in logic why liability should not follow such an invasion of plaintiffs' premises. Restatement of the Law, Section 165, subdivision (c), recognizes the liability for such intrusion, and illustration 8 is of particular interest.
>
> > 'A is skillfully navigating an airplane far above the surface of B's premises. Stress of weather renders the plane unmanageable, and it comes to land in B's field, damaging his crops. A is liable to B.'
>
> Judge Parker, in *United States v. Praylow* [sic], 4 Cir., 208 F.2d 291, 292, at page 294, wrote:
>
> > 'In other words, the flight of an airplane at a proper altitude is recognized as lawful but the person operating it is charged with the responsibility of preventing injury to persons and property beneath. Not to prevent such injury, whether negligent or not, renders the person operating the plane liable at law on the theory that it was his duty under the law to prevent it if he undertook to operate the plane. As said by Judge Moore in *Parcell v. United States*, D.C., 104 F. Supp. 110, 116, "To say that a tort giving rise to absolute liability is not a 'wrongful act' would be a technical refinement of language incompatible with that liberal interpretation of the sovereign's waiver of immunity which the highest court in the land has admonished us to employ. See *United States v. Aetna Casualty & Surety Co.*, 1949, 338 U.S. 366, 70 S.Ct. 207, 94 L.Ed. 171; *United States v. Yellow Cab Co.*, 1950, 340 U.S. 543, 71 S.Ct. 399, 95 L.Ed. 523."' "

The discussion of the Restatement of Torts in the *Hahn* case is also interesting. In the case at bar, the District Court placed reliance upon the fact that breach of fiduciary duty is classified as tortious by that work in a volume separate from that treating negligence. The same is true of the section relied upon in the *Hahn* case.

Parcell v. United States (SD W. Va., 1951) 104 F Supp 110

This was an action brought under the Federal Tort Claims Act and resulting from the crash of two Air Force planes on the plaintiff's land. There was judgment for the plaintiff.

The court held that the principle of absolute liability was applicable and that a tort giving rise to such liability is a "wrongful act" within the meaning of the Federal Tort Claims Act.

In addition to the foregoing authorities, there are numerous cases which, although relating to negligence, arise from a duty divorced from the common-law concept of such conduct envisaged by the District Court. See, for example, the following:

Rayonier Inc. v. United States (1957) 352 US 315, 1 Led2d 354

These were actions brought under the Federal Tort

Claims Act to recover damages resulting from the negligence of Forest Service employees in allowing a forest fire to start on government land, and in failing to use due care to extinguish such fire. Judgments of dismissal were reversed.

The court stated (352 US 319-320, 1 Led 2d 358-359):

> "It may be that it is 'novel and unprecedented' to hold the United States accountable for the negligence of its firefighters, but the very purpose of the Tort Claims Act was to waive the Government's traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability. The Government warns that if it is held responsible for the negligence of Forest Service firemen a heavy burden may be imposed on the public treasury. It points out the possibility that a fire may destroy hundreds of square miles of forests and even burn entire communities. But after long consideration, Congress, believing it to be in the best interest of the nation, saw fit to impose such liability on the United States in the Tort Claims Act. Congress was aware that when losses caused by such negligence are charged against the public treasury they are in effect spread among all those who contribute financially to the support of the Government and the resulting burden on each taxpayer is relatively slight. But when the entire burden falls on the injured party it may leave him destitute or grievously harmed. Congress could, and apparently did, decide that this would be unfair when the public as a whole benefits from the services performed by Government employees. And for obvious reasons the United States cannot be equated with a municipality, which conceivably might be rendered bank-

rupt if it were subject to liability for the negligence of its firemen. There is no justification for this Court to read exemptions into the Act beyond those provided by Congress. If the Act is to be altered that is a function for the same body that adopted it."

Indian Towing Co. v. United States (1955) 350 US 61, 100 Led 48

This was an action brought under the Federal Tort Claims Act to recover damages allegedly resulting from the negligence of the Coast Guard in (1) permitting the light in a lighthouse maintained by it to become extinguished, and (2) failing to repair such light or to give notice that it was not functioning. Judgment of dismissal was reversed.

The court stated (350 US 69, 100 Led 56):

"The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light on Chandeleur Island and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order; and, if the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning. If the Coast Guard failed in its duty and damage was thereby caused to petitioners, the United States is liable under the Tort Claims Act."

American Exch. Bank of Madison, Wis. v. United States (7 Cir., 1958) 257 F2d 938

This was an action brought under the Federal Tort Claims Act to recover for personal injuries sustained by the plaintiff's decedent when she fell on steps leading to an entrance of a federal post office building. Judgment for the defendant was reversed, and the cause was remanded for further proceedings.

The District Court held that neither the Wisconsin Safe Place Statute nor the rules and orders of the Wisconsin Industrial Commission were applicable to the post office building, and that the United States could not be found negligent for its failure to comply with the same. The Court of Appeals held that the same were applicable, and that violation of an order relating to handrails should have been considered in determining the government's liability for negligence in violating such order.

United States v. Lawter (5 Cir., 1955) 219 F2d 559

This was an action brought under the Public Vessels Act and the Federal Tort Claims Act to recover damages for the death of the plaintiff's wife, allegedly caused by the negligence of the Coast Guard in conducting an air-sea rescue. Judgment for the plaintiff was affirmed. The court stated at page 562:

" * * * the uncontradicted evidence shows that the Coast Guard, pursuant to long established policy, affirmatively took over the rescue mission, excluding others therefrom, and thus not only placed the deceased in a worse position than when it took charge, but negligently brought about her death, and it is hornbook law that under such circumstances the law imposes an obligation upon everyone who attempts to do anything even gratuitously, for another not to injure him by the negligent performance of that which he has undertaken. 38 Am.Jur., 'Negligence', Sec. 17, p.659."

Somerset Seafood Co. v. United States (4 Cir., 1951) 193 F2d 631

This was an action brought under the Federal Tort Claims Act to recover damages for the sinking of the plaintiff's ship as a result of the government's negligent marking of a wrecked vessel. Under the Wreck Acts, 33 USCA Sections 409, 736, 14 USCA Section 86, the government had a mandatory duty to remove or mark such wreck. Judgment dismissing the complaint was reversed and the cause remanded for further proceedings.

Otness v. United States (D Alaska, 1959) 178 F Supp 647

This was an action brought under the Federal Tort Claims Act to recover damages allegedly caused by a collision between the plaintiff's vessel and a maritime aid known as Channel Light No. 54. It was found that

the damages were caused by the defendant's negligence, and there was judgment for the plaintiff.

The court held that the defendant breached its duty to exercise due care in its efforts to locate the aforementioned maritime aid after it was discovered that the same was missing. The basis of the duty was stated at page 650:

> " * * * One who voluntarily creates or maintains a condition for the use of others is in the absence of some privilege, charged with the duty to exercise care to prevent that condition from becoming a source of danger to those who use it. * * * The Coast Guard maintains the maritime aids to navigation in Wrangell Narrows and had done so for a number of years. Evidence was introduced showing that these aids assisted the mariners in negotiating the dangerous passage of Wrangell Narrows and mariners relied upon these aids in traversing the passage. Based on the rules above, the voluntary assumption of caring for these aids to navigation placed a duty upon the defendant to exercise due care in maintaining the aids."

Claypool v. United States (SD Cal., 1951) 98 F Supp 702

This was an action brought under the Federal Tort Claims Act to recover damages sustained when the plaintiff was injured by a bear while camping in Yellowstone National Park. There was judgment for the plaintiff.

When the plaintiff asked a ranger whether it was safe to sleep in the park, he was advised that it was,

although the ranger had knowledge that a bear had recently attacked several campers.

The court stated at page 706:

> "We do not believe it is necessary, for the purposes of this opinion, to make any fine distinction as to the exact status occupied by plaintiff when he entered the Park; nor do we deem it necessary to formulate a broad and inclusive definition of the quantum of care owed by defendant to plaintiff. It is enough to say that regardless of whether plaintiff was expressly or impliedly invited into the Park, regardless of whether he had the right to expect protection from injury, he was in the Park by permission of the defendant, and his activities there in no way transgressed the permission given. A danger to plaintiff known by the employees of the Park existed. Under similar conditions, the minimum duty which a private individual would owe a person coming upon premises maintained by such individual would be 'an honest disclosure of the danger known' to provide 'an opportunity for an intelligent choice' as to whether he wished to incur the risk incident to coming upon the land."

In reasoning that the Federal Tort Claims Act does not encompass breach of fiduciary duty, the District Court stated that immunity was not waived as to all torts. In this connection, it pointed to certain types of conduct allegedly outside the scope of the Act (R. 114-115), which will now be considered seriatim.

First, the court stated that immunity was not waived for conduct amounting to a nuisance, citing

Dalehite v. United States (1952) 346 US 15, 97 L ed 1427

This was an action brought under the provisions of the Federal Tort Claims Act to recover damages resulting from the explosion of ammonium nitrate fertilizer, manufactured for the government and under its direction, while it was being loaded for export. The District Court entered judgment for the plaintiffs, but was reversed by the Court of Appeals, and the Supreme Court affirmed the judgment of the Court of Appeals.

It is interesting first to note that the principal holding of the Dalehite case, that liability is not imposed upon the government for acts performed in a "uniquely governmental" capacity, has been abandoned or overruled by the Supreme Court.

> *Indian Towing Co. v. United States*
> (1955) 350 US 61, 100 L ed 48
>
> *Rayonier Inc. v. United States*
> (1957) 352 US 315, 1 Led2d 354

At any rate, in mentioning nuisance (346 US 44-45, 97 L ed 1445), The Supreme Court noted by way of dictum that a residue of a theory of absolute liability without fault was reflected in the District Court's finding that the fertilizer constituted a nuisance and in one of the plaintiff's contentions. Consequently, the discus-

sion of this case will be combined with a consideration of the next points raised by the District Court, that is, that the Act does not impose liability for the ownership and operation of a dangerous instrumentality or liability without fault.

Once again, reference must be made to the language of the Act, which relates to the "*negligent or wrongful* act or omission" of government employees. However, conduct for which absolute liability is imposed may be neither negligent nor wrongful. Thus, the court in the *Dalehite* case stated that the Act is to be invoked (346 US 44-45, 97 L ed 1445):

> " * * * only on a 'negligent or wrongful act or omission' of an employee. Absolute liability, of course, arises irrespective of how the tortfeasor conducts himself; it is imposed automatically when any damages are sustained as a result of the decision to engage in the dangerous activity. The degree of care used in performing the activity is irrelevant to the application of that doctrine. But the statute requires a negligent act. So it is our judgment that liability does not arise by virtue either of United States ownership of an 'inherently dangerous commodity' or property, or of engaging in an 'extra-hazardous' activity."

(It must be remembered that the *Dalehite* case dealt with the negligence aspect of the Act.)

The other cases cited by the District Court on the

subject of absolute liability or liability without fault merely follow the dictum of the *Dalehite* decision and do not require further discussion.

Therefore, under the foregoing authorities, the government would not be subject to liability where its employees have not been guilty of a "negligent or wrongful act or omission," but this does not negate the principle that the government is liable when its employees do commit a negligent or wrongful act or omission. In the case at bar, a government employee did commit a wrongful act, i. e., breach of fiduciary duty. The authorities cited by the court do not detract from the conclusion that the same is within the purview of the Federal Tort Claims Act.

The District Court also points out that "although fraud and deceit may constitute tortious conduct, such conduct does not fall within the provisions of the Act" (R. 115), relying upon

United States v. Gill (WD Pa, 1957)
156 F Supp 955

It is true that governmental immunity from liability has not been waived as to such conduct, but this is by express statutory exception.

28 USCA Section 2680(h)

The statutory exception was the basis of the decision in the *Gill* case, wherein the court stated at page 958:

> "Although the defendant cites 28 U.S.C.A. § 1346 (b) as the requisite statutory authority for his counterclaim, section 2680(h) of that title specifically excludes from the scope of section 1346(b) any claim based on, inter alia, deceit or misrepresentation."

Consequently, this principle is not relevant to a consideration of whether governmental immunity from liability has been waived as to breach of fiduciary duty, for Congress did not remove that tort from the operation of the Act.

Thus, the authorities demonstrate fully that the waiver of immunity from liability embodied in the Federal Tort Claims Act extends to the wrongful acts or omissions committed by government employees. Breach of fiduciary duty is a wrongful act, and as such, it is unquestionably within the purview of the Act.

Point II

In the event that this court affirms the conclusion of the District Court that breach of fiduciary duty is not within the purview of the Federal Tort Claims Act, it should require the District Court to transfer this case to the Court of Claims.

Appellant believes he has shown conclusively that the District Court committed reversible error when it

concluded that appellee's breach of fiduciary duty is not within the purview of the Federal Tort Claims Act and consequently dismissed appellant's complaint. However, in the event that this court should affirm the District Court's conclusion, appellant respectfully urges that the latter should be required to transfer this case to the Court of Claims.

If it is in the interest of justice, the District Courts are required to transfer cases within the jurisdiction of the Court of Claims to the latter court.

28 USCA Section 1406(c)

> "If a case within the exclusive jurisdiction of the Court of Claims is filed in a district court, the district court shall, if it be in the interest of justice, transfer such case to the Court of Claims, where the case shall proceed as if it had been filed in the Court of Claims on the date it was filed in the district court."

In the case at bar, the District Court found that appellee was in a fiduciary relationship with appellant and that it breached the fiduciary duty which it owed to him. This breach of fiduciary duty resulted in a very substantial injury to appellant. If the District Court does not have jurisdiction to grant relief to appellant, it is clearly in the interest of justice that this case be transferred to a court which does have such jurisdiction.

CONCLUSION

The uncontroverted facts in this case clearly disclose that the government in early 1954 determined to proceed with the completion and management of a private housing project at Kodiak, Alaska, which it deemed vital to national defense. This decision was effectuated pursuant to the terms of a so-called "completion agreement," through the medium of a project manager, who was subject to appointment, control, direction and removal by the government. The completion agreement and the acts thereunder created duties and obligations, as well as rights, on the part of both appellant and the government.

By exercising its rights under the completion agreement, the government occupied a fiduciary relationship to appellant, who in reliance upon this fiduciary capacity advanced further personal funds to the project after the completion agreement was executed.

By reason of this fiduciary relationship, the government was under a legal duty through HHFA to conform to a standard of conduct commensurate with such relationship.

HHFA by its seizure of funds in May, 1957, and its filing of a foreclosure suit in June, 1957, failed to conform to the standards required by it by said fiduciary relationship and committed a wrongful act.

Such wrongful act resulted in damages to appellant which he seeks to recover in this action.

The test of whether this action is cognizable under the Federal Tort Claims Act is this: Would a private person be liable to appellant under the uncontroverted facts of this case?

This action is unique in the jurisprudence relating to the Federal Tort Claims Act and the question presented by this appeal, that is, whether breach of a fiduciary duty is within the purview of the Act, is one of first impression.

We respectfully urge that the question posed by this appeal is easily answered in the affirmative under the clear and unequivocal provisions of the Act and the applicable judicial decisions.

Thus, the Act waives governmental immunity from liability as to the tortious conduct of government employees acting within the scope of their employment, where such conduct would render the United States liable if it were a private person. Breach of fiduciary duty is such conduct. Consequently, it is within the purview of the Act, and the District Courts are vested with jurisdiction of claims arising from such breach.

In the case at bar, appellee was in a fiduciary relationship with appellant and breached its fiduciary duty

to him. As a result, the District Court had jurisdiction of his complaint under the Federal Tort Claims Act. In entering judgment dismissing such complaint, the District Court committed manifest error.

Appellant respectfully urges that the judgment of dismissal of the District Court be reversed and judgment entered in his favor.

Respectfully submitted,

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APPENDIX

Exhibit No.	Identified	Offered	Received
115/48	R. 129-130	R. 129-130	R. 130
289/A2	R. 130-131	R. 130	R. 131
512/4	R. 132-133	R. 132	R. 133
562/A-4	R. 133-134	R. 133	R. 134
583/1-140	R. 135-146	R. 135	R. 146
802/65	R. 146-148	R. 146	R. 148
832/A-1-207	R. 148-151	R. 148	R. 151
849/49-4	R. 151-152	R. 151-152	R. 152-153
850/20	R. 153	R. 153	R. 153
851/A-20	R. 153-154	R. 153	R. 154
859/20	R. 154-156	R. 154	R. 157
891/A-21	R. 157	R. 157	R. 158
983/21	R. 158-159	R. 158	R. 159
997/A-22	R. 159-160	R. 159	R. 160
1019/22	R. 160	R. 160	R. 160
1021/A-22	R. 160-163	R. 160	R. 163
1025/A-32	R. 163-166	R. 163	R. 167
1091/22	R. 167	R. 167	R. 167
1144/23	R. 167-168	R. 167-168	R. 168
1150/A-32	R. 168-170	R. 168	R. 170
1177	R. 128	R. 128	R. 128-129